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No. 73-390

In the Supreme Court of the United States

OCTOBER TERM A.D. 1973

CLEMENS K. SHAPIRO, et al.,

Petitioners,

vs.

EDWARD J. BARRETT, et al.,

Respondents.

REPLY OF PETITIONERS

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This case is presented to this Court for the second time. In *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 409 U.S. 1103, this Court in reversing the Illinois Supreme Court said "that making corporations and other like entities liable for ad valorem taxes on personal property but not individuals does not transcend the requirements of equal protection." (App. 8)

Petitioners contend that the direction of this Court to the Illinois Supreme Court was misapprehended and unconstitutionally applied because the Illinois Supreme Court while exempting natural persons owning personal property

—however, and unconstitutionally, continued to impose personal property tax on natural persons owning personal property for the sole reason that such property is held for those persons either in conservators, guardians, trustees, or other fiduciaries.

Natural persons owning personal property subject to that tax were at all times before the lower courts and this Court. Those natural persons are all members of the class of these petitioners.

The record plainly discloses that the original complaint of petitioners, plaintiffs, in the trial court alleged, inter alia:

> Members of the class represented before this Court are admitted by those plaintiffs to include, and are limited to include, all others affected by Amendment Article IX, § 4 to Illinois Constitution of 1870, in regard to all that amendment which those plaintiffs are not limited to non-citizens of this State, those residents of the business of this State, and those owning of the property as provided in Section 116 of Illinois Revenue Act of 1939, ch. 120, Sec. 687, et seq. [1] Rev. Stat. 1969).

Section 116 [1] Rev. Stats. 1971, ch. 120) enumerates who must list personal property in Illinois and specifically enumerates the group most interested in this petition for certiorari, to wit, trustees, minors, trustees, clerks, businesses of trusts, and persons and heirs of deceased persons. See Appendix I hereto.

It is patent from the pleadings and throughout the proceedings both in the trial court and in the Illinois Supreme Court, as well as in the proceedings before this Court, all as disclosed by the record herein, that petitioners plaintiffs, at all times, represented those persons who are petitioners here—the natural person beneficiaries of trusts, estates, etc. The plaintiffs in this case, at all times

have included "all others affected by Amendment Article IX A" including "those required to list property as provided in Section 538." 54 Ill. 2d 237.

Moreover, Illinois' Attorney General rendered an official opinion concerning the scope and encompassment of Article IX A, embraced and adopted by petitioning plaintiffs, and that opinion answered for defendant state officials the taxable status of trusts, and estates and their beneficiaries as far as the Attorney General was concerned. The opinion of the Attorney General was an integral part of this case from its inception and became the focal point of his argument to this Court and that of these petitioners in the first appeal to this Court. (See Am. Pet. for Cert. in Appeal No. 71-695, App. D, pp. A 41-47)

The Illinois Supreme Court would not have ruled on the question of the rights of individuals who are minors, beneficiaries of trusts, etc., if petitioners here did not "bring themselves within the class of persons allegedly discriminated against." *I.E.M. v. Korshak*, 34 Ill. 2d 595, 608, 217 N.E. 2d 794, 800 (1966), *Hoodin v. Korshak*, 39 Ill. 2d 521, 536 N.E. 2d 897, 901 (1968).

If those cases alone are not persuasive authority for the proposition that the Illinois Supreme Court will not rule on a matter unless the parties are before it, and the logical inference flowing therefrom, that when the court determines rights of parties to the case those parties are in fact before the court, then the State's Attorney's own pleadings in the *Hoodin* case demonstrate conclusively that the defendants created these issues as being directly presented to, and before the Illinois Supreme Court and, indeed, adjudicated and determined by that Court.

The motion of the county respondents, defendants in *Hoodin*, to dismiss the complaint (attached as Exhibit II)

demonstrates respondents' assertions of the *res judicata* effect of the Illinois Supreme Court decision sought to be reviewed here. However, the defendants now argue contrary to their own representations in the Illinois trial courts that the *res judicata* decision of the Illinois Supreme Court is based on the absence of the parties vitally interested in that determination (petitioners herein).

Frankly, petitioners are non-plussed at the obviously resentful posture purported at this late date by respondents, which posture is patently gainsaid by the record in this case, and bespeaks a purpose and motivation contrary to that heretofore represented by all parties to this Court and the Courts below, to wit: to obtain the most immediate and most comprehensive resolution of all the vexatious and serious problems inherent in this litigation, the finality of which litigation is of such great import and consequence to both the revenue of the State of Illinois and its citizens-taxpayers as well.

Respondents have abandoned these objectives. Respondents have foresaken these principles and these concerns.

Respondents urge now that this Court should ignore disservice to this Court's mandate—that the State of Illinois and its citizens should continue submerged in the unrealistic and constitutionally offensive classification emergent from the lower court's supplemental opinion issued subsequent to this Court's remandment—that Illinois and its citizens should not be entitled to an immediate resolution of this issue—but, to the contrary, the State of Illinois and its citizens should remain in this state of uncertainty until some other case, presently in one of Illinois' trial courts wends its way over months and possibly years to reach the point and present the issues before this Court, that are present this day in this proceeding.

The constitutional issue asserted here by petitioners arises because of the Illinois Supreme Court opinion and therefore could not have arisen earlier or been presented earlier. While petitioner Shapiro has asserted from the inception of this litigation that the exemption of "individuals" included natural persons, and Herman contended that only corporations remained taxable and individuals embraced everyone but corporations—the same position the Attorney General took in his official opinion—the Illinois Court, after reversal and remand, split the individual class into fractions, exempting Herman's class of natural person sole proprietors and Shapiro natural persons to the extent that they owned personal property in their individual non-business capacity, but continued the tax on Shapiro natural persons who owned property as beneficiaries of trusts and estates minors, incompetents, etc.

It is incredible to believe that the State's Attorney of Cook County could or would argue at this late stage in these proceedings for the absence of jurisdiction in the Illinois Supreme Court to decide an important constitutional question involving all trusts, estates and fiduciary relationships in the State of Illinois. That court has decided that issue. These petitioners were before that court. The record so proves.

There simply is no question but that these petitioners, not only have standing to, but, indeed, it is their duty to this Court to protect the mandate of this Court from misapplication by the Illinois Supreme Court, which misapplication makes this Court's mandate offensive to the "equal protection" clause of the 14th Amendment to the Constitution of the United States.

The misrepresentations implicit in the brief of the respondents are serious and most unlawyerlike. At no time throughout the history of this case have the respondents ever alleged that the Illinois Supreme Court, or any other

Illinois Court, lacked the authority in these proceedings to conclusively determine the rights of all estates and trusts, and their beneficiaries, to an exemption under Article IX-A from the Illinois personal property tax.

The appendices attached hereto and full and complete proof against all of respondents contentions.

Illinois Attorney General, like these petitioners, desires now as both have throughout these proceedings a most immediate resolution. Illinois Attorney General does not resist this petition.

To now seek to deny a petition to this Court, not on the merits, not on an argument of lack of jurisdiction over a question of state law, but by the intimation that petitioners cannot now raise these issues in this Court, is ground alone for this Court to exercise more than its usual scrutiny and compels the relief sought by these petitioners.

For these reasons, and those already presented in the petition for writ of certiorari, this Court should grant its writ and reverse the judgment appealed from.

Respectfully submitted,

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APPENDIX

APPENDIX I

§ 534. Who lists personal property (Ill. Rev. Stats. 1971, Ch. 120)

Personal property shall be listed in the following manner:

(1) Every person of full age and sound mind, being a resident of this State, shall list all his moneys, credits, bonds or stocks, shares of stock of joint-stock or other companies (when the capital stock of such company is not assessed in this State), moneys loaned or invested, annuities, franchises, royalties and other personal property.

(2) He shall also list all moneys and other personal property invested, loaned or otherwise controlled by him as the agent or attorney, or on account of any other person or persons, company or corporation whatsoever, and all moneys deposited, subject to his order, check or draft, and credits due from or owing by any person or persons, body corporate or politic.

(3) The property of a minor child shall be listed by his guardian; if he have no guardian, then by the father, if living; if not, by the mother, if living; and if neither father nor mother be living, by the person having such property in charge.

(4) The property of an idiot or lunatic, by his conservator; or if he has no conservator, by the person having charge of such property.

(5) The property of a person for whose benefit it is held in trust, by the trustee; of the estate of a deceased person, by the executor or administrator.

(6) The property of corporations whose assets are in the hands of receivers, by such receivers.

(7) The property of a body politic or corporate, by the president, or proper agent or officer thereof.

(8) The property of a firm or company, by a partner or agent thereof.

(9) The property of manufacturers and others in the hands of an agent, by and in the name of such agent, as merchandise.

APPENDIX II

MOTION TO DISMISS FILED AUGUST 23, 1973

Come now Stanley T. Kusper, Jr., County Clerk of Cook County, Illinois, Bernard J. Korzen, County Treasurer and *ex-officio* County Collector of Cook County, Seymour Zaban and Harry H. Semrow, Members of the Board of Appeals of Cook County, and P. J. Cullerton, County Assessor of Cook County, defendants in the above entitled cause, by their attorney, Bernard Carey, State's Attorney of Cook County, Illinois, and in support of their Motion to Dismiss, state as follows:

1. That plaintiffs have filed this declaratory judgment suit, individually and in a representative capacity on behalf of all those who are members of the classes of trustees, fiduciaries and beneficiaries which plaintiffs represent.

2. That the Supreme Court of Illinois considered the classes which are represented by the instant plaintiffs in the context of Illinois personal property taxation in its supplemental opinion of April 25, 1973, in *Lake Shore Auto Parts, Inc.* v. *Korzen,* cons. (Docket No. 44199). The Court stated in part:

> "The personal property thus left subject to taxation under Article IX-A includes the following categories of ownership: partnerships, joint ventures, professional associations and professional service corporations. Trustees and fiduciaries, whether corporate or not, do not own property as natural persons, and they were not exempted from taxation by Article IX-A."

3. That plaintiffs cite in their complaint this language of the Illinois Supreme Court, but contend that it is not

binding upon them or the classes which they represent because they were not represented as parties or members of the class in *Shapiro* v. *Barrett* (No. 71 L 5745), consolidated with the *Lake Shore* case. However, this same issue was raised in original *Lake Shore* proceedings before the Illinois Supreme Court and the Court there held that it is not necessary that all persons being affected must be represented as parties to the action, stating at 49 Ill. 2d 144-145:

> "The plaintiffs in the Maynard and Shapiro cases justify the institution of their actions upon the ground that there are deficiencies as to parties and as to legal propositions in the Lake Shore case which might, without the assistance which they volunteer to supply, preclude the possibility of full consideration of the issues by this court. That it is not necessary that each person or group of persons favorably or unfavorably affected by a legislative classification be made parties to an action challenging the validity of that classification is apparent. Major cases involving discrimination of the sort here alleged have not required the presence, as parties, either in person or by representative of all those affected. See, e.g., *Lawrence* v. *State Tax Com. of Miss.* (1932), 286 U.S. 276, 76 L. Ed. 1102, 53 S. Ct. 556." 49 Ill. 2d at 144-145.

4. That the very theories which are presented in the instant complaint were also submitted to the Illinois Supreme Court for its consideration prior to the issuance of its supplementary opinion by William R. Dillon, one of the counsel for the present plaintiffs. Included as Appendixes I and II to this Motion to Dismiss are copies of the suggestions in the nature of a Brief as *amici curiae* and the supplement to these suggestions filed by Mr. Dillon. Therefore, the Illinois Supreme Court was fully aware of the issues involving the instant classes, and, as such, the classes

represented by the plaintiffs were not prejudiced by their failure to be included as parties to the litigation.

Wherefore, the defendants to this cause, by their attorney, Bernard Carey, State's Attorney of Cook County, Illinois, respectfully submit that the instant complaint must be dismissed for failure to state a cause of action in view of the fact that the Illinois Supreme Court has determined, after being fully advised of the position of fiduciaries and trustees, that said classes are not exempted from personal property taxation by Article IX-A.